LIBRARY
SUPREME COURT. U. S.

FILED
FEB 21 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1139

THEODORE GLADDEN,

Petitioner

v.

P. HENDERSON & CO.

v.

LAVINO SHIPPING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ABRAHAM E. FREEDMAN,
AVRAM G. ADLER,
STANLEY PAUL KOPS,
FREEDMAN, BOROWSKY AND LORRY,
Lafayette Building, 8th Floor,
Fifth and Chestnut Streets,
Philadelphia, Pa. 19106
Attorneys for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

The Opinion of the Court Below has Vitiated the Protective Scope of *Eichel v. New York Central Railroad Company*, 375 U. S. 253, 11 L. Ed. 2d 307 (1963) and Permits the Prejudicial Receipt of Evidence of Collateral Benefits. 6

CONCLUSION 11

APPENDIX A 13

Opinion of the United States Court of Appeals for the Third Circuit 13

Judgment of the United States Court of Appeals for the Third Circuit 22

APPENDIX B 23

Opinion and Order of the United States District Court for the Eastern District of Pennsylvania 32

TABLE OF CITATIONS.

Cases:

	Page
Boudwin v. Yellow Cab Co., 410 Pa. 31, 188 A. 2d 259 (1963)	10
Caughman v. Washington Terminal Co., 345 F. 2d 434	8
Eichel v. New York Central Railroad Company, 375 U. S. 253, 11 L. Ed. 2d 307 (1963)	6, 7, 8, 9, 10, 11
Lobalzo v. Varoli, 409 Pa. 15, 185 A. 2d 557 (1962)	10
Mangan v. Broderick and Bascom Rope Co., 351 F. 2d 24 (C. A. 7, 1965), reh. den.	9
Page v. St. Louis Southwestern Ry. Co., 349 F. 2d 820 (C. A. 5, 1965)	9
Tipton v. Socony Mobil Oil Company, 375 U. S. 34, 11 L. Ed. 2d 4, rehearing den. 375 U. S. 936, 11 L. Ed. 2d 268	8, 11
Thompson v. Kawasaki Kisen, K. K., 348 F. 2d 879 (C. A. 1, 1965)	10, 11

Miscellaneous:

Federal Rules of Civil Procedure, Rule 43(a)	10
Longshoremen and Harbor Workers' Compensation Act, March 4, 1927, c. 509 § 1, 44 Stat. 1424; 33 U. S. C. A. 901, et seq.	8
S. 2485, 90th Cong. 1st Sess. § 3(a)	7
U. S. C. A. 1254 (1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

THEODORE GLADDEN,

Petitioner

v.

P. HENDERSON & CO.

v.

LAVINO SHIPPING COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Theodore Gladden, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on November 2, 1967.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (App. A, *infra*, pp. 13-21) is reported at ——F. 2d ——. The opinion of the Trial Court (App. B, *infra*, pp. 23-26) is reported at 39 F. R. D. 303 (E. D. 1966).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 2, 1967 (App. A, *infra*, p. 22). By order dated January 31, 1968, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including Wednesday, February 21, 1968. The jurisdiction of this Court is invoked under U. S. C. A. 1254 (1).

QUESTION PRESENTED.

Where the petitioner longshoreman was paid $70 a week under the Longshoremen and Harbor Workers Compensation Act, which is a fraction of his regular income, and he testifies that he stopped seeing his physician and went back to work after seven weeks, notwithstanding he still had pain, because he was behind in bills, was it not prejudicial for the Court to permit questions relating to the receipt of these benefits?

STATEMENT OF THE CASE.

This was a civil action commenced by Theodore Gladden as petitioner-plaintiff, arising out of an injury suffered by him while working as a longshoreman aboard the S/S Katha on August 31, 1961. All page references are to the Appendix filed in the Court below.

Theodore Gladden had been a longshoreman since the age of sixteen. At the time of the accident, he was twenty-six years of age (254a, 253a). He had not finished high school. Apart from four years in the Navy, he had spent his entire working career on the waterfront as a longshoreman (254a). He was married. Prior to the accident he was making well over $6000 per year.

On the day of the accident, the petitioner was hired as a winch operator for a 7:00 p.m. start aboard the S/S Katha. The first thing that petitioner did upon boarding the vessel was to check the rigging at the No. 2 hatch, which the gang of which he was a member had been assigned. Petitioner was operating the inshore winch in which the lines were rigged from the vessel to a block on the pier. This type of rigging places a greater strain on the lines and the blocks utilized. There was a bucket-type seat for the winch operator to sit in while he operated the winch (267a).

The seats being made of metal, the plaintiff, who was a heavy man, put some mats on the seat to lend it some degree of softness (267a). He sat on the rear part of the seat so as to have leg room (267a). The heel block for the inshore fall was fastened by a rope to the padeye on the mast house to prevent athwartship movement of the block. In addition, the block itself was raised in a vertical plane and wrapped around the heel of the boom by a wire that had been doubled with two half-hitches then moused with four

pieces of rope (78a). Mousing means that the open ends of the half-hitch are tied in an attempt to prevent them from parting. This arrangement had been rigged by the crew (79a). During the discharging operations that evening, the wire holding the block to the boom came loose, the wire having cut through the mousing (80a). The sudden force caused the rope holding the block to the mast house to break and the block swung in the direction of the plaintiff, striking him in the back (81a). Plaintiff found himself on his hands and knees on the deck (272a). Plaintiff, after a brief rest, was walked off the vessel and driven to the front of the pier by a supervisor (273a, 274a).

The only factual testimony contrary to the petitioner's version of the accident, supported by fellow longshoremen, was the testimony of two supervisors for the respondent stevedore, Lavino Shipping Company. These two witnesses —Doyle (401a) and Donnelly (509a)—were permitted to testify, over objection, that it was physically impossible for the block upon the breaking of the rope to strike the plaintiff sitting in the seat provided. This position or contention was never stated in respondent Lavino's pretrial memorandum, though local rules require defendant or third-party defendant to indicate the areas of agreement or disagreement with the facts stated in the plaintiff's pretrial memorandum and to set forth their contentions in opposition, if any.

Plaintiff was first treated at Albert Einstein Medical Center, Southern Division, in the Accident Ward (275a). Shortly thereafter, he came under the care of Dr. Jacob Krause, a certified orthopedic surgeon, who found first an acute lumbo-sacral sprain and thereafter a chronic lumbo-sacral sprain (171a, 193a). Inasmuch as the plaintiff was a very large man with a certain degree of obesity, the excess weight imposed additional physical stress on an injured musculo ligamentus structure (195a).

During the course of the trial, petitioner's counsel had elicited from petitioner that he had not seen his physician after seven weeks because his bills had gotten behind and he was returning to work to try to catch up with the bills and support his family (277a). On cross-examination counsel for the respondent, P. Henderson & Co., was permitted over objection to elicit from the petitioner that he had been paid $70.00 a week by the respondent stevedore, Lavino Shipping Company, during the period of time that he was out of work (316a-319a).

The trial of the cause which began before the Honorable Ralph C. Body on May 10, 1965, resulted in a verdict for the defendant. During the argument prior to the submission of the case to the jury, counsel for the respondent shipowner, P. Henderson & Co., in the light of racial cleavage in which the petitioner and his witnesses were Negro and the witnesses for the respondents and the jury were white, argued that in order for Mr. Gladden to exercise his "rights" in Court, he must also observe his "responsibilities" (816a, 817a). Objection was made to this line of argument and exception granted (817a).

Post-trial motions were timely filed and denied and an opinion filed on February 21, 1966 by the Trial Court. Appeal was then timely taken by the petitioner to the United States Court of Appeals, Third Circuit. On November 2, 1967, the Court of Appeals affirmed the judgment of the court below. The opinion of that Court found that the testimony of the petitioner that he prematurely returned to work and did not visit his physician again because he had fallen behind in the payment of his bills gave license to the defendant to inquire as to benefits received by him under the Longshoremen and Harbor Workers Compensation Act.

REASONS FOR GRANTING THE WRIT.

The Opinion of the Court Below Has Vitiated the Protective Scope of Eichel v. New York Central Railroad Company, 375 U. S. 253, 11 L. Ed. 2d 307 (1963) and Permits the Prejudicial Receipt of Evidence of Collateral Benefits.

Eichel v. New York Central Railroad Company, 375 U. S. 253, 11 L. Ed. 2d 307 (1963) was a landmark case inasmuch as it recognized the prejudicial impact of collateral benefits under pension and compensation statutes. This Court in a Per Curiam opinion reversed the Court of Appeals for the Second Circuit which had admitted evidence of disability pension payments under the Railroad Retirement Act for the purpose of impeaching the testimony of the plaintiff as to his motive for not returning to work and as to the permanency of his injuries. The Court of Appeals had found that the prejudicial effect of receiving such testimony was outweighed by the substantial probative value of such evidence.

The Court of Appeals for the Second Circuit in *Eichel* had recognized that it would be error to permit such testimony to be utilized in mitigation of damages. The Court of Appeals, however, had permitted the testimony on the basis that it was permissible for impeaching the credibility of the plaintiff.

However, in reversing the Court of Appeals in the *Eichel* case, this Court said:

> "In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than

the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 USC § 228b (a)4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act." (footnotes omitted)

In the instant case, the circumstances are almost identical. The distinguishing feature of the circumstances of the instant case is that the plaintiff in testifying on direct examination testified that he did not see a physician after six weeks because he had bills to pay and returned to work. It is this single factor that forms the basis of the opinion of the Court below as removing the petitioner from the protective mantle of *Eichel.*

The Court in its opinion ignores the fact that the $70.00 paid per week under the Longshoremen and Harbor Workers Act is but a fraction of what petitioner customarily received during his employment. It ignores the fact that the average working man does not have a cushion of savings to fall back on and fractional income, while better than nothing, does not necessarily obviate economic duress.

Thus, an injured claimant must forego a frank statement of his economic position and the effect upon his motivation as to medical treatment and returning to work lest it permit the defendant to utilize the avowed prejudicial effect of collateral benefits. The paucity of the $70.00 benefit in alleviating financial distress when a longshoreman is out injured has long been recognized.[1]

The Court below, as an afterthought in further justification of permitting the receipt of collateral benefits, points to the fact that Workmen's Compensation as such

1. There is now pending before Congress a bill to increase the maximum benefits paid under the Longshoremen and Harbor Workers Act to $105.00 per week; S. 2485, 90th Cong. 1st Sess. § 3(a).

was never mentioned. If anything, this is more prejudicial to the petitioner. In this light, there could be an implication that a beneficent employer without legal cause contributed to the petitioner's support. Coupling this with the fact that executives of the employer were the only fact witnesses contrary to the position taken by the petitioner, this lent an unfair gloss to their testimony. The Court below also seeks absolution from the *Eichel* doctrine by the fact that in self-defense, counsel for the petitioner argued that any monies received from the employer would have to be paid back. Apart from the fact that this was never so charged by the Trial Court, this argument is much like attempting to stem a breach in the dikes by one's fingers; it is woefully inadequate.

The Court of Appeals for the Third Circuit in the instant case seeks to create escape hatches from the ineluctable language of *Eichel* that upon closer examination proves to be mirages. If this be permitted, almost anything that the plaintiff says can be utilized to vitiate the rule in *Eichel.*

The petitioner had been examined by a physician of the Respondent Henderson's choosing. There was available medical testimony to present, to dispute the contentions of the petitioner as to his physicial disability. There was no need to introduce the benefits paid under the Longshoremen and Harbor Workers Act [2] in any guise. The intention was clearly to exploit its prejudicial effect. In the instant case, the issue of damages was not reached because of a verdict for the defendant on the liability issue.

A defendant's verdict does not make the receipt of the evidence of collateral benefits harmless, as was recognized in *Tipton v. Socony Mobil Oil Company,* 375 U. S. 34, 11 L. Ed. 2d 4, rehearing den. 375 U. S. 936, 11 L. Ed. 2d 268, see also: *Caughman v. Washington Terminal Co.,* 345 F. 2d

2: Longshoremen and Harbor Workers' Compensation Act, March 4, 1927, c. 509 § 1, 44 Stat. 1424; 33 U. S. C. A. 901, et seq.

434, 435. The prejudicial effect of the receipt of this type of testimony pervades all the issues of the case. This is especially so when the jury in the Eastern District of Pennsylvania is chosen from a wide swath of communities, including rural counties where the collateral benefits would seem unusually lucrative. A jury such as this might not be capable of seeing this amount in the proper perspective to the petitioner's prior scale of living.

In *Page v. St. Louis Southwestern Ry. Co.*, 349 F. 2d 820, 822 (C. A. 5, 1965), the Court of Appeals for the Fifth Circuit found that there were no escape hatches or exceptions to the broad scope of *Eichel:*

> "Both *Tipton* and *Eichel* reflect a strong policy against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases. With the whole result in our case being the enigma wrapped in the mystery of a general verdict concealing forevermore the use or uses to which the jury might have put this evidence, we cannot say that the error, preserved by emphatic and timely objection, was harmless." (Page 822)

In *Mangan v. Broderick and Bascom Rope Co.*, 351 F. 2d 24, 27-30 (C. A. 7, 1965), reh. den., a spectrum of rationale was utilized by ingenious counsel to implant the prejudicial effect of receipt of compensation benefits into a trial. In rebuffing these attempts, the Court of Appeals for the Seventh Circuit there said:

> "Any slight value which such evidence might have in discrediting a witness is far outweighed by the likelihood that such evidence will be misused by a jury. *Tipton v. Socony Mobile Oil Co.*, 375 U. S. 34, 84 S. Ct. 1, 11 L. Ed. 2d 4; *Eichel v. New York C. R. Co.* 375 U. S. 253, 84 S. Ct. 316; *Burnett v. Hernandez,* 9 Cir., 263 F. 2d 212. Indeed, we can conceive of few instances in

> which the value of such evidence would merit the effort of its producement if the evidence did not at the same time advise the jury that the plaintiff had already collected some money for his injury. As one court pointed out the "smell" of insurance or workmen's compensation must be presumed to affect a jury adversely to a plaintiff's cause. *Burnett v. Hernandez,* 9 Cir., 263 F. 2d 212, 214." (Page 30)

It must be remembered in this case that there was an attempt by counsel for the respondents to sow in the courtroom the seeds of racial ferment at a time when persons of questionable motives were equating responsibilities with civil rights. Analogous language was used by counsel for the respondent Henderson as to the petitioner herein (816a, 817a). In this climate, the receipt of the evidence as to compensation benefits was doubly provocative and prejudicial.

In *Thompson v. Kawasaki Kisen, K. K.,* 348 F. 2d 879 (C. A. 1, 1965), the receipt of testimony similar to the instant case was permitted. With dubious reasoning, the Court decided that *Eichel* was applicable only as to cases under the Federal Employers' Liability Act and that under Rule 43(a) of the Federal Rules of Civil Procedure, the more liberal rule as to the receipt of evidence would apply as to the Federal and state courts. The Court found that in Massachusetts the receipt of such testimony is admissible and on that basis, the judgment of the Court below was affirmed. Even if this dubious reasoning be accepted, it could not be applied to the instant case. The Supreme Court of Pennsylvania in *Boudwin v. Yellow Cab Co.,* 410 Pa. 31, 188 A. 2d 259 (1963); *Lobalzo v. Varoli,* 409 Pa. 15, 20-21, 185 A. 2d 557 (1962) has echoed the principles set forth in *Eichel v. New York Central Railroad Co., supra.* Thus, even under the doubtful reasoning of *Thompson v.*

Kawasaki Kisen, K. K., 348 F. 2d 879 (C. A. 1, 1965) respondent Henderson should not have been permitted to elicit from the petitioner evidence as to his receipt of benefits under the Longshoremen and Harbor Workers Act.

CONCLUSION.

This Court has always stood as a bastion against the emasculation and erosion of the substantial legal principles that it promulgates to correct inequities and secure justice. The salutary principles established in *Tipton v. Socony Mobil Oil Company*, 375 U. S. 34, 11 L. Ed. 2d 4, rehearing den. 375 U. S. 936, 11 L. Ed. 2d 268, and *Eichel v. New York Central Railroad Company*, 375 U. S. 253, 11 L. Ed. 2d 307 (1963), are in danger of being riddled with meaningless exceptions. The decision of the instant case in the Court below, if not reversed, will be seized upon as a signpost for evasion of the salutary principles set forth in *Eichel*. A claimant would be forced to suppress the reasons he returned to work lest he be said to open the door to the introduction of highly prejudicial testimony as to the receipt of benefits under the Workmen's Compensation Act.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
AVRAM G. ADLER,
STANLEY PAUL KOPS,
FREEDMAN, BOROWSKY AND LORRY,
Attorneys for Petitioner.

APPENDIX A.

OPINION OF UNIED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed November 2, 1967)

Argued September 15, 1967

Before BIGGS, FREEDMAN and SEITZ, *Circuit Judges*

FREEDMAN, *Circuit Judge.*

In this diversity case a jury rejected the claim of plaintiff, a longshoreman, that while working on defendant's vessel he sustained personal injuries as a result of the negligence of defendant and the unseaworthiness of the vessel. Plaintiff claimed that while operating a winch he was struck in the back by a block or pulley housing which had broken loose from its inadequate rigging. He seeks a new trial because of errors which he claims occurred in the course of the trial.

I.

Plaintiff contends that the district court erred in permitting him to be cross-examined regarding the forbidden matter of workmen's compensation benefits. To understand the objection it is necessary to consider the circumstances in which the cross-examination occurred.

On direct examination plaintiff testified that for seven weeks after the accident he was treated by a Dr. Krause and was unable to work. After the first day following his

return to work he suffered stiffness and pain, but he did not see Dr. Krause again. Asked why he did not return to Dr. Krause, he replied: "Well, during the seven weeks that I was out of work seeing Dr. Krause my bills got behind and when I went back to work, that was one of the main reasons I went back to work, was to try to catch my bills up and support my family." It was this testimony which brought about the cross-examination of which plaintiff complains.

After plaintiff had reiterated that his return to work was because of financial distress, defendant's counsel asked him: "During this period that you were receiving treatment from Dr. Krause, did your employer make it possible for you to receive any financial assistance?" Plaintiff's counsel objected and added: "Any benefits secured by Mr. Gladden must be repaid." The court in effect overruled the objection and plaintiff replied that he had received some such financial assistance, but that it was not what he was accustomed to earn on the job; it was, he said, about $70 a week.[1] In the course of a colloquy his counsel stated that Dr. Krause had been paid for his services by the third party defendant. The trial judge indicated that while he would ordinarily have forbidden this cross-examination, he would permit it on the ground that plaintiff himself had opened the subject in his testimony that he had returned to work and had not gone back to Dr. Krause because of his straitened financial circumstances.

Although plaintiff refers to the cross-examination as dealing with the receipt of workmen's compensation, neither the questions asked nor the colloquies which surrounded them describe the financial assistance as coming

1. The benefits alluded to were apparently those payable to injured employees under the Longshoremen's and Harbor Workers' Compensation Act, §§ 7, 8, 33 U. S. C. §§ 907, 908.

from workmen's compensation or its equivalent. The problem, however, remains the same, for the collateral benefit rule is not limited to workmen's compensation payments. See the comprehensive discussion and citations by Chief Judge Biggs in *Feeley v. United States*, 337 F. 2d 924, 929-31 (3 Cir. 1964).

It is now well settled in Pennsylvania that payments of workmen's compensation, unemployment and other collateral benefits should remain unknown to a jury in weighing damages,[2] because of the danger of prejudicial effect, even when offered as logically relevant evidence affecting the credibility of a plaintiff's claim of the extent of his injury.[3] The same principle is the foundation for the inadmissibility of evidence regarding collateral benefits or conduct relating to their receipt in cases arising under the Federal Employers' Liability Act[4] and the Jones Act.[5]

Here, however, plaintiff on direct examination brought into the case an additional, affirmative element by testifying that he had returned to work and had not visited Dr. Krause again because he had fallen behind in the payment of his bills and wanted to catch up on them and support his family. Defendant was not required to leave this testimony unchallenged and had the right to ask plaintiff on cross-examination whether he had received financial assistance, as affecting the credibility of his assertion.[6] To

2. Feeley v. United States, 337 F. 2d 924, 931-32 (3 Cir. 1964); see Eichmann v. Dennis, 347 F. 2d 978, 982 (3 Cir. 1965). See also Annot., 7 A. L. R. 3d 516 (1966) and related citations at 518-19.

3. Boudwin v. Yellow Cab Co., 410 Pa. 31, 188 A. 2d 259 (1963); Lobalzo v. Varoli, 409 Pa. 15, 20-21, 185 A. 2d 557 (1962).

4. Eichel v. New York Central Railroad Co., 375 U. S. 253 (1963); see also Mahon v. Reading Company, 367 F. 2d 25 (3 Cir. 1966) (Federal Safety Appliances Act).

5. Tipton v. Socony Mobil Oil Co., 375 U. S. 34 (1963).

6. See Rice v. Shenk, 293 Pa. 524, 143 Atl. 231 (1928); Sperry v. White Star Lines, Inc., 315 Pa. 361, 172 Atl. 646 (1934).

have forbidden such cross-examination would have conferred on plaintiff the unparalleled right to give testimony on direct examination with immunity from inquiry on cross-examination. This is what distinguishes the present case from *Eichel v. New York Central Railroad Co.*, 375 U. S. 253 (1963), upon which plaintiff relies. In that case, brought under the Federal Employers' Liability Act, the plaintiff had not affirmatively testified in such a manner as to warrant any effort at contradiction by cross-examination. Instead, defendant there attempted to introduce prejudicial evidence of disability pension payments simply because it was logically relevant on the extent and duration of the plaintiff's disability. The barriers which have been created against the admission of otherwise relevant evidence because of its prejudicial effect do not extend to the affirmative volunteering by a plaintiff of testimony which breaks into this restricted area.

If plaintiff had not added his affirmative testimony on direct examination he would have had the advantage of the collateral benefit rule and the jury would have been required to assess his damages without any knowledge of the collateral benefit he received. They would not have had before them the effect it might have had on plaintiff's claim of extensive and continued impairment of his health. But the collateral benefit rule cannot be made a springboard from which a plaintiff may go forward with affirmative evidence that he returned to work while he was still ailing, because of financial need and then seek immunity from cross-examination regarding it. The boundary of silence was crossed when plaintiff affirmatively presented on direct examination the reason why he had returned to work after seven weeks and had not again visited his physician. The trial court therefore was justified in opening the door for cross-examination for the narrow purpose of testing the credibility of

plaintiff's assertion. Moreover, plaintiff's counsel stated without objection that plaintiff was obliged to repay the $70 a week assistance, so that any suspicion of a double recovery was eliminated.

II.

Plaintiff claims that the trial judge erred in refusing to permit the introduction in evidence of a report of the accident known as Form 202, which is required under the Longshoremen's and Harbor Worker's Compensation Act.[7] The form was filed by plaintiff's employer, Lavino, the third party defendant. Lee, who prepared the report for Lavino, was called as plaintiff's witness and testified that he prepared the form on the basis of a so-called pier report which had been prepared by Doyle, Lavino's supervisor. He also tesified that neither Doyle nor Donnelly, Lavino's Assistant Vice President, who had contradicted plaintiff's version of the accident, had given him any information contrary to what he had put into Form 202.

In the light of this testimony we cannot say that the trial court abused its discretion in rejecting the offered document. Whatever argument could be made from any failure of Doyle and Donnelly to supply their contradictory version for Lee's report in Form 202 or in a supplemental report was already available in the evidence and did not require the introduction of the document to make it so. The avowed purpose for which plaintiff offered the document was the impeachment of the credibility of Doyle and Donnelly because of the inconsistency of the report with their testimony. Whatever inconsistency existed already appeared, and permission to include such cumulative evidence is a matter within the discretion of the trial judge. See *McKee v. Jamestown Baking Co.*, 198 F. 2d 551, 556 (3 Cir. 1952),

7. § 30, 33 U. S. C. § 930.

see also *Woods v. National Life & Accident Ins. Co.*, 380 F. 2d 843, 847 (3 Cir. 1967). Moreover, since the report stated plaintiff's version of the accident, it cannot be said to have been an arbitrary exercise of discretion by the trial court to refuse to permit its reiterated emphasis which would have been the result of the admission of the document in evidence. We therefore do not reach or decide the effect of the provision in § 30(c) of the Longshoremen's and Harbor Workers' Compensation Act [8] that the report "shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made." [9]

III.

Plaintiff contends that in the course of his summation defendant's counsel made appeals to the jury which require reversal.

1. At one point, having argued earlier that the accident could not have happened as claimed by plaintiff and that at most a trivial disability was being vastly exaggerated, defendant's counsel went on to say that plaintiff nevertheless was a citizen of this country and as such had every right to appeal to the courts, but that it was a matter of civics teaching that where there were rights there were responsibilities, and he wondered whether the jury would feel after hearing all the evidence in the case that plaintiff had observed his responsibilities. At this plaintiff's counsel interjected that the argument was highly improper and asserted that the responsibility for bringing the action was his and that he accepted full responsibility for doing so. He added that he thought that the argument was reaching

8. 33 U. S. C. § 930(c).

9. See Taylor v. Baltimore & Ohio Railroad Co., 344 F. 2d 281, 287 (2 Cir.), cert. denied, 382 U. S. 831 (1965).

"highly dangerous ground" and should cease at that moment. There was no objection as such, although the court noted an "exception" for plaintiff, and with this colloquy defendant's counsel turned his argument in another direction.[10]

It is suggested that the argument was sinister because plaintiff and his witnesses are Negroes, whereas the witnesses for the defendants and the jurors were white, although the record, of course, reveals nothing on this subject.[11] The trial judge in denying plaintiff's motion for new trial found the contention without merit and declared that plaintiff had received a fair trial. Moreover, plaintiff's objection at the trial was directed to the further development of the argument rather than to what had already occurred and thus indicates that he did not contemporaneously consider that propriety had been overstepped, but

---

10. The precise language of the argument and the colloquy is as follows:

"Now, I want you to understand Mr. Gladden is a citizen of this country and he has every right to the courts of this country, every right that anyone else has in this courtroom, but I think we learned way back in civics that you can put the rights here and you have got to put some responsibility over here, and I just wonder whether you, after hearing all the evidence in this case, will feel that Mr. Gladden has lived up to, has observed his responsibilities under all the circumstances now—

"Mr. Adler: May it please the court, that argument is highly improper. The responsibility for bringing in a cause of action is mine, and I accept full responsibility, and I think that Mr. Mahoney is getting on highly dangerous ground and I think it is intentional and I think the argument ought to cease at this moment in that vein. He has a right to come into court—

"Mr. Mahoney: Your Honor—

"Mr. Adler: —he had a right to come into this court.

"The Court: You can answer all this in rebuttal. Note an exception on the record for you."

11. For an analysis of the problems raised by counsel's appeal to racial, national or religious prejudice, see Annot., 99 A. L. R. 2d 1249 (1963), and cases cited therein.

rather feared that the argument might be leading to something improper. We recognize, of course, the difficulty of openly expressing such an objection and therefore adding to the injury. Nevertheless, we cannot say from the record that the opinion of the trial judge, who had a better opportunity to judge the unrecorded effect of the summation, that plaintiff received a fair trial is erroneous because an argument that one should not invoke the aid of the courts in a false claim for a trivial injury, without anything else, clearly constitutes an appeal to racial prejudice.

2. Plaintiff complains that defendant's counsel argued to the jury that some of plaintiff's witnesses were fellow members of his union, also had damage suits pending against steamship companies and were represented by the same law firm which represented plaintiff and the union.[12]

Even if the contention otherwise had merit, it is unjustified here because the summation was based upon evidence which was elicited in cross-examination of plaintiff and his witnesses, all without objection by plaintiff's counsel. The evidence, therefore, was in the record and accordingly was a legitimate subject for comment in the summation to the jury.

On the merits, the evidence elicited on cross-examination went to the credibility of the witnesses. One witness, a longshoreman, testified on cross-examination that it was in the discussion of his own claim with another member of the same law firm that he was reminded of the facts relating to plaintiff's claim. Another witness, who is plaintiff's cousin, had three suits then pending against various steamship companies in which he was represented by the same law firm. Still another witness was represented by the same law firm in two suits which he had pending against steamship companies. He acknowledged that he came to court

12. Inflammatory and biased appeals by counsel generally are discussed in Annot., 78 A. L. R. 1438 (1931).

to testify without a subpoena on receiving a telephone call from plaintiff's counsel at 5:45 o'clock that morning.

In these circumstances, where the credibility of plaintiff's version of the accident and his claim of injury were the paramount issues, it was appropriate for defendant to show that there existed a solidarity of the witnesses with the plaintiff. Their identification of interest with him was not only as members of the same union but also as claimants injured while working on the waterfront who had actions pending against defendants similarly situated, and all of them were represented by the same counsel, with whom at least on occasion, discussion of one man's claim spilled over into discussion of his role as a witness in plaintiff's suit. The strength of this community of interest was shown by the evidence of the prompt appearance in court of one of the witnesses on counsel's informal, last minute summons. All this went to the question of the partiality or disinterestedness of the witnesses and was properly received into evidence. In any event, since the evidence was received without objection, it was proper to argue that the jury should consider it in weighing the credibility of the witnesses.

The judgment of the district court will be affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Present: BIGGS, FREEDMAN and SEITZ, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 19, 1965, be, and the same is hereby affirmed, with costs taxed against appellant.

Attest:

THOMAS F. QUINN,
Clerk.

November 2, 1967

APPENDIX B.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

February 21, 1966.

BODY, *J.*

On August 31, 1961 plaintiff, a longshoreman, was allegedly injured while helping to unload lumber aboard the S. S. Katha. In his Complaint plaintiff contends that he was operating the starboard winch at the forward end of the hatch at No. 2 hold from which the lumber was being discharged. He further claims that a heavy heel block, which had been fastened by a rope to a padeye on the masthead, fell and struck him on the back when the rope broke. Plaintiff instituted this action for damages by reason of unseaworthiness or negligence against the shipowner, P. Henderson & Company. The shipowner in turn impleaded the stevedoring company, Lavino Shipping Company, claiming indemnity.

After a trial of seven days before this Court and a jury, the jury found that the vessel was seaworthy and that the shipowner was free of negligence. The verdict was rendered on May 19, 1965 and judgment was entered thereon for the defendant and third-party defendant and against the plaintiff. Plaintiff then filed his Motion for a New Trial which is now before the Court.

The ground principally relied upon by plaintiff in support of his present motion is that the Trial Court erred in permitting defendant to make an "oblique reference" to workmen's compensation in the presence of the jury.[1]

1. The Court denied the request of plaintiff's counsel for a sidebar conference [N. T. p. 289].

Plaintiff points to the fact that counsel for defendant elicited from plaintiff on cross-examination that he had been receiving benefits from his employer in the amount of seventy dollars ($70.00) per week. [N. T. p. 292] This line of questioning apparently was pursued by defendant since plaintiff had previously testified on direct examination that although he had still experienced pain after having been discharged by a physician, he had returned to work because he was in financial distress.

It is true as a general principle that no mention of collateral benefits received by a plaintiff may be made since such benefits are not relevant because they cannot mitigate the damages sought to be recovered. *Lobalzo v. Varoli*, 409 Pa. 15 (1962); *Moidel v. Peoples Natural Gas Co.*, 397 Pa. 212 (1959). It is important to note, however, that in this case those pernicious words "Workmen's Compensation" were never uttered within earshot of the jury during the lengthy trial. In fact, this "reference" alluded to by plaintiff was so "oblique" that we do not consider it a reference to workmen's compensation at all,[2] and that it in no way tainted or influenced the jury's verdict.

The Trial Court based its discretionary ruling on the ground that the "subject had been opened" earlier by plaintiff. [N. T. p. 291] That ruling is supported by the record and in no way constituted prejudicial error.[3] The subject which the Court found had already been injected into the

---

2. In its brief contra plaintiff's Motion for a New Trial defendant indicates, and this Court finds as a fact, that the closest reference to the term itself came on plaintiff's examination of Charles S. Lee, a rebuttal witness. Mr. Lee's testimony dealt in large part with his preparation of U. S. Form 202 which was marked as plaintiff's Exhibit P-9 [N. T. pp. 751-758]. This form must be filed with the U. S. Department of Labor, Bureau of Employees' Compensation, and this bureau is identified on the face of the form itself.

3. It is interesting to note that plaintiff's counsel did not request the withdrawal of a juror at this point in the trial.

trial numerous times by plaintiff's counsel was, of course, the matter of plaintiff's financial condition after his alleged injury and the employer's assistance in alleviating that condition.

We are satisfied that plaintiff suffered no prejudice as a result of the reference to financial assistance *made possible* by his employer.[4] The jury could have easily believed that the "assistance" rendered was in the form of a loan or other monies which plaintiff was obligated to repay. This is no more speculative than plaintiff's contention that the jury was led to believe that plaintiff was attempting to recover damages for something for which he had already been reimbursed. In other words, it is entirely possible that such a reference to the employer's temporary financial aid might well have helped, rather than hindered, plaintiff's case in the eyes of the jury.

This is just another case of a disappointed litigant. It is the opinion of this Court that, apart from legal abstractions, the entire matter can be reduced to the simple fact that the jury did not believe plaintiff's testimony. Such a belief is also no less speculative than plaintiff's argument that the jury returned a verdict against him mainly because they heard some reference to his receipt of financial aid made possible by the employer.

After a careful review of the trial record and briefs, we find no merit whatsoever to plaintiff's remaining contentions in support of his Motion for a New Trial. The Court is convinced that plaintiff had both a full and a fair day in court.

---

4. The few questions elicited from plaintiff on cross-examination were directed to the subject of financial assistance "made possible" by his employer. The exact nature of this assistance was never revealed because the Court carefully limited defendants' counsel to three questions on that particular topic [N. T. pp. 290-292].

ORDER.

And Now, this twenty-first day of February, 1966, It Is Ordered that the Motion of the plaintiff, Theodore Gladden, for a New Trial be and the same is Denied.

/s/ Ralph C. Body, *J.*

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 22 19
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1139.

THEODORE GLADDEN,
Petitioner,

v.

P. HENDERSON & CO.,
Respondent,

v.

LAVINO SHIPPING COMPANY.

BRIEF IN OPPOSITION

TIMOTHY J. MAHONEY,
E. ALFRED SMITH,
THOMAS E. BYRNE, JR.,
KRUSEN, EVANS AND BYRNE,
21 South 12th Street,
Philadelphia, Penna. 19107
Attorneys for Respondent.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
COUNTER STATEMENT	1
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	3
Nothing in the Case at Bar Remotely Apprpaches the Situations Which Were Before This Court in the Cases of Eichel and Tipton	3

TABLE OF CITATIONS.

Cases:	Page
Eichel v. New York Central Railroad Company, 375 U. S. 253 (1963)	3
Page v. St. Louis Southwestern Ry. Co., 349 F. 2d 820 (C. A. 5, 1965)	3
Tipton v. Socony Mobil Oil Company, 375 U. S. 34 (1963)	3
Thompson v. Kawasaki Kisen, K. K., 348 F. 2d 879 (C. A. 1, 1965)	4
Miscellaneous:	
45 USCA 51	3
46 USCA 688	3

COUNTER STATEMENT.

By reason of injuries alleged to have been sustained on August 21, 1961 the Petitioner instituted this suit. The question raised by the Petition turns upon whether a plaintiff in a personal injury action, who has intruded into the area of collateral source by testifying on direct examination that he has been forced to return to work prematurely and has been unable to obtain additional medical attention by reason of lack of funds,[1] may foreclose all cross-examination by defendant into the accuracy of that part of his direct testimony.

The fact of workmen's compensation was never mentioned and if the inference of compensation arose, it was because plaintiff's own counsel injected it into his opening statement to the jury when he advised the jury that the treating physician had been "selected" (later amended in open court to "paid", R. 319a) by his employer.

Respondent's counsel was most careful in the manner in which he explored that subject so as to do no more than repair the damage done by the plaintiff's testimony without injecting the subject of workmen's compensation. The context of the cross-examination is as follows:

> "Q. Mr. Gladden, I believe that it is stated in an answer to an interrogatory that you went back to work following your treatment by Dr. Krause on October 9, 1961. Can you confirm that that is correct?

---

1. "Q. How did you feel after you had worked for a day?
A. I still had stiffness and pain.
Q. Did you go back to see Dr. Krause?
A. No, I did not.
Q. Why not?
A. Well, during the seven weeks that I was out of work seeing Dr. Krause my bills got behind and when I went back to work, that was one of the main reasons I went back to work, was to try to catch my bills up and support my family." R. 277a.

A. I am not sure of the date but I did go back after Dr. Krause had released me.

Q. Now, you testified on direct examination that you were prompted to go back to work because you were suffering from some financial distress; is that correct?

A. I didn't understand the first part of the question. I understood the second part.

Q. You testified that you went back to work after being discharged by Dr. Krause because you were under some financial distress; you needed the money?

A. Well, yes.

Q. You had to pay bills, I think you said?

A. Yes.

Q. During this period that you were receiving treatment from Dr. Krause, did your employer make it possible for you to receive any financial assistance?" R. 315a-316a

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

Nothing in the Case at Bar Remotely Approaches the Situations Which Were Before This Court in the Cases of Eichel and Tipton.

Nothing in *Eichel*[2] and *Tipton*[3] or any other decision by this or any other court permits the plaintiff in a personal injury action to use the rule against evidence of collateral source benefits as an offensive weapon which the defendant is powerless to deflect.

This case was not brought in a federal court because plaintiff was attempting to enforce a federally created right as under F. E. L. A.[4] or the Jones Act.[5] It is, therefore, doubtful that Eichel or Tipton have any application, for in Eichel this court said that the introduction of collateral source benefits by a defendant attempting to establish an "affirmative defense":

> ". . . would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937 . . . were considered as evidence of malingering . . ." 375 U. S. at 255.

That certainly is the interpretation which at least one Court of Appeals has placed upon Eichel and Tipton.

> "Both Tipton and Eichel reflect a strong policy against the use of such collateral source evidence in F. E. L. A. and analogous Jones Act—maritime law seamen's cases." *Page v. St. Louis Southwestern Ry. Co.* 349 F. 2d 820, 822 (C. A. 5, 1965).

---

2. *Eichel v. New York Central R. R. Co.*, 375 U. S. 253.
3. *Tipton v. Socony Mobil Oil Co. Inc.*, 375 U. S. 34.
4. 45 USCA 51.
5. 46 USCA 688.

Judge Breitenstein of the Tenth Circuit, writing for the First Circuit (by special designation) in *Thompson v. Kawasaki Kisen, K. K. etc.*, 348 F. 2d 879 at 881 put it succinctly:

> "The instant case is not based on any federal statute but rather on ordinary negligence. No authority of which we are aware holds that the rules of evidence applicable to ordinary negligence cases do not apply when the plaintiff is a longshoreman and the defendant is a shipowner. Rule 43(a) F. R. C. P. provides that evidence shall be admissible . . . and that the rule which favors the reception of the evidence governs." [footnote omitted] 348 F. 2d at 881.

Petitioner is, therefore, not on firm ground when he asserts that this court should examine a case where a District Judge and three Judges of the Court of Appeals have clearly held that it would be unfair to mute a defendant upon a point which plaintiff himself has used as an offensive weapon.

It must be recalled that the fact that Petitioner was entitled to receive and actually did receive benefits under a compensation statute was never mentioned, except possibly by indirection on the part of plaintiff and plaintiff's counsel. The fact of the matter is that "Workmen's Compensation" was never mentioned at all.

There was no attempt by defendant to make use of collateral source as an offensive weapon. The subject had been gratuitously opened by plaintiff and plaintiff's counsel. This is a far different situation than Tipton and Eichel, where collateral source was opened, not by plaintiff, but by defendant in an attempt to establish a sort of "affirmative defense" of malingering. Here, the plaintiff attempted to

"puff" his case and fundamental fairness required that defendant should not have been prevented from "unpuffing" it.

Judge Freedman, writing for an unanimous Court of Appeals, was clearly right when he said:

> "The barriers which have been created against the admission of otherwise relevant evidence because of its prejudicial effect do not extend to the affirmative volunteering by a plaintiff of testimony which breaks into this restricted area." — F. 2d — [16a, appendix to Petion]

Fundamental fairness precludes any such result as that which Petitioner asks this court to grant. Petitioner, in a sense, set the ground rules. He had no sound reason to open up the collateral source point. Having opened it, he cannot criticize the defendant who closed it as gently and as circumspectly as possible. Petitioner's afterthought complaints do not merit judicial sympathy.

Nothing in this case merits this court's review. There is no conflict. This court's decisions are plain and have been followed.

The Petition should be dismissed.

Respectfully submitted,

TIMOTHY J. MAHONEY,
E. ALFRED SMITH,
THOMAS E. BYRNE, JR.,
KRUSEN EVANS AND BYRNE,
Attorneys for Respondent.